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No. 93-1688

In The

Supreme Court of the United States

October Term, 1993

CENTRAL DISTRIBUTORS OF BEER, INC.,

Petitioner,

v.

DONALD CONN, GLORIA CONN, JOHN NATE BEVERAGE INC., AND JOHN NATE, JR.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FEILER, JOELSON, LAKIND & ROSENBERG
PAUL F. JOELSON
32255 Northwestern Highway, Ste. 145
Farmington Hills, MI 48334
(810) 626-9966

ISRAEL & WEINBAUM, P.L.C.
ASHLEY J. ISRAEL
30100 Telegraph Road, Ste. 350
Bingham Farms, MI 48025
(810) 642-0046

Counsel of Record

Counsel for Respondents/Donald Conn and Gloria Conn

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

PARTIES TO THE PROCEEDING

PETITIONER

Central Distributors of Beer, Inc.

RESPONDENTS

Donald Conn and Gloria Conn

OTHER RESPONDENTS

John Nate Beverage, Inc., and John Nate, Jr.

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JURISDICTION

That the Respondents, Conn, agree with the statements of Petitioner in invoking the jurisdiction of this Court under 28 USC Section 1254(1) as set forth in the Petitioner's brief.

STATEMENT OF THE CASE

The Petitioner, Central Distributors of Beer, Inc., filed this action alleging four (4) State law claims and one (1)

claim under the Racketeering Influence and Corrupt Organizations Act, 18 USC Section 1961 et seq. ("RICO"). In its RICO claim, the Petitioner alleges that the Respondents committed mail and wire fraud by engaging in a scheme to sell beer to retailers and other consumers within the Petitioner's exclusive territory and to obtain false refunds of deposits from the Petitioner. The Respondents filed a Motion to Dismiss Action for failure to state a claim upon which relief could be granted. (Federal Rule of Civil Procedure 12 (b)(6)), which was initially granted by the District Court. Upon a Motion for Rehearing and Reconsideration, the District Court afforded the Petitioner an opportunity to amend its complaint and the Respondents again filed a Motion to Dismiss and for Summary Disposition to the amended complaint. The District Court granted summary judgment in favor of the Respondents on the Petitioner's amended RICO claim, finding that the Petitioner had failed to present evidence to support its claim that mail or wire fraud were the predicate acts to support its RICO claim. Specifically, the court found undisputed evidence that the Respondents Conn were not aware of the existence of the Petitioner before the commencement of the action, that there was no evidence that Respondent John Nate, Jr. sold beer to Respondents Conn through John Nate Beverage Company, Inc., or with any intent to defraud the Petitioner and, furthermore, that there was no evidence that Respondents Conn purchased from Respondents Nate any of the beer that was distributed in the territory of the Petitioner. Because the RICO claim was the only basis for the District Court's jurisdiction, the court dismissed the

Petitioner's remaining State law claims and the Petitioner appealed to the Sixth Circuit Court of Appeals.

The Sixth Circuit affirmed the decision of the District Court below and denied a Motion for Rehearing and Reconsideration, and it is from that decision that the Petitioner now files its Petition for Writ of Certiorari.

FACTUAL BACKGROUND OF THE CASE

The Petitioner, Central Distributors of Beer, Inc., is a wholesaler of Anheuser-Busch brands of beer. Pursuant to the Michigan Liquor Control Act and the wholesale equity agreement between the Petitioner and Anheuser-Busch, the Petitioner has an exclusive territory that includes part of Wayne County, Michigan. Under the exclusive territory agreement, the Petitioner had the exclusive distribution rights for Anheuser-Busch products to retailers in its territory. Under a similar exclusive distribution agreement with Anheuser-Busch, Defendant, John Nate Beverage, Inc., another wholesaler, had similar exclusive rights in another part of the State of Michigan. The Michigan Liquor Control act prohibits a distributor with an exclusive distribution territory from selling beer to retailers located outside its exclusive territory and permits the sale of beer only to licensed retailers. The Petitioner's complaint alleges that Respondents, Donald and Gloria Conn, purchased Anheuser-Busch products from Respondent, John Nate Beverage, Inc., between 1983 and 1989. Respondents Conn are not licensed retailers under the Michigan Liquor Control act. The Respondents Conn are then alleged to have sold the beer to retailers

and individuals in the exclusive territory of the Petitioner, out of their home in the City of Allen Park. According to the complaint, Respondent, John Nate Beverage, Inc., through Respondent, John Nate, Jr., is alleged to have sold the beer to the Respondents Conn, knowing that they intended to sell the beer in the Petitioner's territory.

The Respondents deny any such scheme to defraud Central Distributors and Respondent, Gloria Conn, denies any involvement in the sale of beer from her home. Respondent, Donald Conn, has filed an Affidavit denying any intention to defraud the Petitioner and denying any knowledge of their existence until served with this civil law suit.

The Respondents deny the allegations that Respondents Conn purchased beer directly from Respondents John Nate Beverage, Inc. Respondent, Donald Conn, never purchased beer directly from the Petitioner, and no retailer has been joined as a party defendant or an alleged co-conspirator in the alleged scheme to defraud the Petitioner. Furthermore, the Petitioner has failed to come forth with any evidence of any individual who Petitioner can establish purchased beer from respondent Donald Conn instead of from itself or a retail establishment within its territory.

REASONS FOR DENYING THE PETITION

I. THE SIXTH CIRCUIT'S RULING THAT IN ORDER TO CONSTITUTE WIRE FRAUD, THE DEFENDANT MUST MAKE A FALSE STATEMENT DIRECTLY TO THE PERSON DEFRAUDED, IS CONSISTENT WITH THE DECISIONS OF THE MAJORITY OF THE CIRCUITS.

A. There Is No Direct Conflict Among The Eight (8) Circuits That Have Addressed This Issue.

The Petitioner is mistaken when it alleges that there is no consensus among the Circuits on the issue as to whether or not the Defendant must make a false statement directly to the person defrauded. Furthermore, there is no confusion as to the state of the law. It is untrue that the First and Ninth Circuits have decided that a fraudulent statement does not have to be made directly to the person defrauded. There is very clear case law to the contrary. The case law in the Eighth and Tenth Circuits are distinguishable, and are not RICO cases. As for the Second Circuit, there is no split at the Court of Appeals level and all of the decisions are consistently in favor of the so-called convergence requirement.

B. Since 1987, No Circuit Has Ruled Contrary To The Decision Of The Sixth Circuit In This Case.

The contention of the Petitioner that the First Circuit has interpreted the RICO statute differently to the Sixth Circuit in the current case is wrong. The Petitioner relies upon *United States vs. International Term Papers*, 477 F2d, 1277, 1279 (1st Cir. 1973), which is a 1973 criminal case

involving a scheme to receive money through the mail by means of false representations. It is not a civil RICO case and, as such, is distinguishable on its facts. In any event, the statement quoted by the Respondent in its brief has not been followed in subsequent cases by the First Circuit. See *McEvoy Travel vs. Heritage Travel, Inc.*, 904 F2d 786, 794 (1st Cir. 1990).

The Petitioner's attempt to distinguish *McEvoy* in its footnote 3 is flawed. *McNally vs. United States*, 483 US 350, 97 L.Ed. 2d 292, 107 S.Ct. 2875 (1987) has not been overturned in its entirety and the convergence theory has not been struck down by Congress by virtue of 18 USC Sec. 1346.

The Petitioner also relies upon *United States vs. Wise*, 553 F2d 1173 (8th Cir. 1977) for its contention that the Eighth Circuit does not support the convergence theory. *United States vs. Wise*, is likewise distinguishable by virtue of the fact that it does not involve an alleged RICO violation and, furthermore, it placed reliance on *United States vs. Scaramuzzo*, 505 F2d 102 (9th Cir. 1974) for its contention that the alleged communication need not be directed to the victim of the fraudulent scheme. The Ninth Circuit no longer follows *United States vs. Scaramuzzo* or, for that matter, *Schreiber Distributing Company vs. Servwell Furniture Co, Inc.*, 806 F2d 1393 (9th Cir. 1986).

In recent years, the Ninth Circuit has consistently ruled in favor of the convergence theory. In *United States vs. Lew*, 875 F2d 219, 221 (9th Cir. 1989) which was approved and followed in *United States of America vs. Molinaro, Mangano and Mangano*, 11 F3d 853 (9th Cir. 1993), the court, approving of *McNally*, stated as follows:

> "The intent must be to obtain money or property from one who is deceived."

The only other Circuit which the Petitioner claims has ruled that no statement to the person defrauded is necessary is the Tenth Circuit. The Petitioner makes reference to a 1932 case, which was decided before the RICO statute had been enacted and to *United States vs. Puckett*, 692 F2d 663, 669 (10th Cir. 1982) cert denied, 459 US 1091, which, once again, was not a case specifically involving a civil RICO action. The *Puckett* case cited the *United States vs. Wise* case, that relied upon case law that is no longer being followed by the Circuit in which it was decided in. The Tenth Circuit has since approved of the convergence theory. (*United States vs. Shelton*, 848 F2d 1485, 1495 (10th Cir. 1988)).

C. Seven Circuits Have Ruled That A Statement To The Person Defrauded Is Required.

The Petitioner is incorrect when it states that only three (3) Circuits have ruled that a statement to the person defrauded is required. In fact, the First Circuit has consistently required it. (*McEvoy Travel vs. Heritage Travel, Inc.*).

The Second Circuit has consistently followed this theory beginning with *United States vs. Evans*, 844 F2d 36, 39 (2nd Cir. 1988) and discussion to the contrary has been limited to the District Court level.

The Fourth Circuit in *Brandenberg vs. Seidel*, 859 F2d 1179 (4th Cir. 1988) has supported the convergence theory.

The Sixth Circuit supported the convergence theory which followed its earlier dicta in *Bender vs. Southland*

Corp., 749 F2d 1205, 1216 (6th Cir. 1986) and *Blount Financial Service, Inc. vs. Walter E. Heller & Co.*, 819 F2d 151, 152 (6th Cir. 1987) in *Central Distributors of Beer, Inc. vs. Conn*, 5 F3d 184 (6th Cir. 1993).

The Seventh Circuit has affirmed the theory of convergence in *United States vs. Keane*, 678 FSupp 708, 711 (N.D. Ill 1987) affirmed 852 F2d 199 (7th Cir. 1988) cert denied, 490 U.S. 1084, 109 S.Ct. 2109, 104 L.Ed. 2d 670 (1989).

The Ninth Circuit has ruled consistently in favor of the convergence theory since *United States vs. Lew, et seq.*

The Tenth Circuit has ruled in favor of the convergence theory in *United States vs. Shelton.*

II. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THIS ISSUE.

The Circuits have consistently ruled in Civil RICO actions that a proper Plaintiff must be the party that is both defrauded and the victim of the false representations. There is a consistency in the decisions of the Circuit Courts in that regard and it is not an issue in controversy that requires further clarification by this Honorable Court.

CONCLUSION

For all of these reasons, the Petition for Writ of Certiorari should be denied.

Respectively submitted,

FEILER, JOELSON, LAKIND & ROSENBERG
PAUL F. JOELSON (P15507)
Attorney for Respondents, Conn
32255 Northwestern Highway
Suite 145
Farmington Hills, MI 48334
(810) 626-9966

ISRAEL & WEINBAUM, P.L.C.
ASHLEY J. ISRAEL (P41747)
Attorney for Respondents, Conn
30100 Telegraph Road
Suite 350
Bingham Farms, MI 48025
(810) 642-0046